IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1837

PUNTA GORDA ISLES, INC., WILBER H. COLE, ALFRED M. JOHNS, ROBERT J. BARBEE, SAMUEL A. BURCHERS, JR., RUSSELL C. FABER, JOHN MATARESE, ROBERT C. WADE, EARL DRAYTON FARR, JR., JOHN W. DOUGLAS, D.D.S.,

Petitioners,

against

CECIL LIVESAY and DOROTHY LIVESAY, for Themselves and on Behalf of all Others Similarly Situated,

Respondents.

COOPERS & LYBRAND,

Petitioner,

against

CECIL LIVESAY and DOROTHY LIVESAY, for Themselves and on Behalf of all Others Similarly Situated,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI To the United States Court of Appeals for the Eighth Circuit

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This brief is submitted in opposition to two related petitions for Writs of Certiorari* which seek review of a

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* Respondents received the Petitions for Writs of Certiorari on June 24, 1977.

judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on March 4, 1977, as to which rehearing was denied on March 28, 1977. In its decision, the Court of Appeals ruled that the United States District Court for the Eastern District of Missouri abused its discretion in decertifying the class herein for alleged delay by plaintiffs in prosecuting the litigation when no basis existed for a finding of wrongful delay by plaintiffs, when "much of the delay in this case is directly attributable to defendants," and when the District Court had itself taken action which did not advance the progress of the litigation. *Livesay* v. *Punta Gorda Isles, Inc.*, 550 F.2d 1106, 1110-1112 (8th Cir. 1977) (11a-16a).*

The Court of Appeals based its jurisdiction to hear the appeal on the "death knell doctrine" under which an immediate appeal lies from an order denying class certification under 28 U.S.C. § 1291 when the record shows that the litigation will not proceed absent reversal of such order. As shown below, the Eighth Circuit's decision is fully consistent with the decisions of the various circuits which have expressly adopted the "death knell" doctrine, and the record would also support appellate jurisdiction in the two circuits which have rejected the "death knell doctrine". The present petitions are simply a further attempt by defendants to continue the tactics of delay for which they were criticized by the Court of Appeals.

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* The District Court opinion below is not yet officially reported, and is set forth as Appendix A to this brief (pages 1a to 2a). The Eighth Circuit March 4, 1977 opinion is reported at 550 F.2d 1106 and is set forth as Appendix B to this brief (pages 3a to 16a).

Questions Presented

(a) With Respect To All Petitioners

Does an appeal lie under 28 U.S.C. § 1291 from a judgment decertifying a class where the record provides substantial basis for the Circuit Court's conclusion that the action would not proceed absent reinstatement of the plaintiffs as class representatives and the District Judge had stated at the evidentiary hearing on class certification that an immediate appeal from denial of class certification would be appropriate?

(b) With Respect To Petitioner Coopers & Lybrand

Did the Court of Appeals exceed its authority in ruling that the District Court had abused its discretion in decertifying the class for delay in prosecuting the litigation when the delays in the litigation were actually caused by defendants and by the District Court?

Statutes and Rules Involved

The issues presented involve 28 U.S.C. §§ 1291 and 1292(b), and Rule 23 of the Federal Rules of Civil Procedure, the texts of which appear in Appendix C hereto.

Statement of the Case

In July 1973, plaintiffs (the respondents herein) commenced this class action for damages resulting from purchases of securities issued by defendant-petitioner Punta Gorda Isles, Inc. ("Punta Gorda"), a Florida land development company, pursuant to a Registration Statement and Prospectus dated May 2, 1972. The first amended complaint alleges that defendants violated various sections of

the federal securities laws including Sections 11 and 12 (2) of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77l(2).

In April 1974, plaintiffs moved for an order determining that the action proceed as a class action. Shortly thereafter, defendants took plaintiffs' depositions on all issues relating to the pending action, including extensive questioning concerning plaintiffs' financial resources, anticipated expenses of the litigation, and plaintiffs' intention to continue the litigation if class certification were denied. *E.g.*, App. 29a-30a; 51a-52a; 105a-108a.* Immediately upon conclusion of such depositions defendant-petitioner Coopers & Lybrand ("Coopers") moved to stay all discovery other than discovery relating to the class action determination, and Coopers' motion was granted on May 13, 1974.

The class motion was argued on June 24, 1974. During the autumn of 1974, the District Court denied a motion by plaintiffs to lift the stay on substantive discovery but did not decide the class action motion. Consequently, plaintiffs petitioned for a writ of mandamus on November 1, 1974 requesting the Eighth Circuit to order the District Court to lift its stay on discovery. On November 15, 1974, the Eighth Circuit Court of Appeals denied the petition for a writ of mandamus, but directed that:

> "Petitioner should request a prompt ruling on its motion of April 9, 1974 for an order determining that a class action existed. If an evidentiary hearing is desired, that likewise can be requested. The trial court should then promptly rule on petitioner's motion and remove its stay order and thereafter permit discovery to proceed on the merits. . . ." (App. 175a-176a)

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* "App." references are references to pages of the Joint Appendix on the Appeal.

As a result of the Eighth Circuit's order, an evidentiary hearing on the class motion was held on December 30, 1974. At that hearing evidence was presented to the District Court concerning the extent of plaintiffs' loss (approximately $2,650), plaintiffs' financial position, anticipated litigation expenses, plaintiffs' intention to pursue the litigation if class status were denied, and the extent to which any other potential class members had manifested an interest in the litigation. *E.g.*, App. 192a, 209a-210a, 213a-226a, 244a-245a, 272a-274a, 295a-296a. At the conclusion of the evidentiary hearing, District Judge Wangelin stated that an immediate appeal would be appropriate if he refused to certify the class:

> "I'm sure you've all heard of the quote Dealth Knell Doctrine, and assuming, without deciding, that I rule against a class action, I think the record should be in such shape that plaintiffs could 1291 it, and go up to the Eighth Circuit and get an opinion . . ." (App. 313a).

On June 19, 1975, Judge Wangelin certified the class, and on July 25, 1975, plaintiffs moved to dissolve the stay on substantive discovery pursuant to the prior direction of the Eighth Circuit. Defendants opposed such motion and moved for reconsideration of class status. On October 23, 1975, the District Court denied plaintiffs' motion to lift the stay on substantive discovery, lifted the stay on discovery solely to allow discovery of names and addresses of class members, agreed with defendants that questions had been raised concerning the adequacy of plaintiffs as class representatives because plaintiffs had not joined

Punta Gorda's underwriters as defendants,* and ordered submission of proposed forms of notice of pendency of class action.

Proposed notices of pendency were submitted to Judge Wangelin in November 1975, and Judge Wangelin mailed to counsel his proposed notice of pendency on March 1, 1976. Further comments upon the proposed notice were submitted by plaintiffs and defendants, and on April 9, 1976, the District Court mailed to all counsel the final form of notice of pendency. On receiving such form, plaintiffs requested from Punta Gorda the names and addresses of record owners of Punta Gorda securities for a period deemed relevant by plaintiffs so that plaintiffs could provide notice of the class action to such owners. Punta Gorda refused to provide such information, and motion practice ensued concerning plaintiffs' request for such information and the differing positions taken by the parties concerning the proper method of providing notice to the class. While such motion practice was occurring, defendants moved to decertify the class on various grounds, including their claim that plaintiffs had unduly delayed in prosecuting the litigation.

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* New counsel had appeared for plaintiffs on June 30, 1975 in response to a ruling by the District Court on June 19, 1975 that plaintiffs' original counsel had a conflict of interest in his continuing relationship with Punta Gorda's underwriters. In an affidavit sworn to September 4, 1975 and in supplementary information provided at a pre-trial conference on November 4, 1975, plaintiffs' new counsel advised Judge Wangelin of their intention not to sue the underwriters. Such decision was required because claims against the underwriters had been barred by the statutes of limitations even prior to new counsel's appearance. Plaintiffs' new counsel had also determined that the joining of underwriters was unnecessary because the existing defendants have ample resources to pay any judgment and any underwriters' liability was at best secondary. Coopers' accusation on pages 9-10 of its petition that plaintiffs or their present counsel "suppressed" conflict of interest problems of plaintiffs' first attorney is wholly without foundation and is intended to divert this Court from the issue which expressly gave rise to the decertification—*i.e.*, the question of undue delay in the litigation.

The District Court granted the motion for decertification on September 1, 1976, and only then did the District Court release its stay on substantive discovery. See 1a-2a. As the Court of Appeals held, the District Court expressly based its decision "solely on the finding that plaintiffs were not adequate class representatives because they had inordinately delayed in prosecuting the litigation. . . ." 550 F.2d at 1110; 11a.

On appeal, the Eighth Circuit reversed, holding that the District Court's finding that plaintiffs were inadequate class representatives was so erroneous as to constitute an abuse of discretion. The Court of Appeals addressed itself carefully to defendants' and the District Court's bases for attributing undue delay to plaintiffs and found that undue delay by plaintiffs had not been shown. 550 F.2d at 1111-12; 11a-14a. The Circuit Court agreed that undue delay had occurred, but found that such delay was in large part caused by defendants and was also attributable to the District Court:*

> "That there has been undue delay in this lawsuit is beyond question. From examination of the entire record of this protracted proceeding, however, it becomes quite clear that much of the delay in this case is directly attributable to defendants. For example, defendants had been granted 14 extensions of time, totalling approximately 190 days, in which to file pleadings, motions and other papers. In addi-

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* An example of defendants' delaying tactics noted by the Eighth Circuit was Punta Gorda's objecting to plaintiffs' request for disclosure of the names and addresses of registered owners of Punta Gorda securities on the ground that such information was not in Punta Gorda's possession. Since this information was in the possession of Punta Gorda's transfer agent, which agent would be required to release such information at Punta Gorda's direction, the Court of Appeals properly described this objection by Punta Gorda to be "little else than a delaying tactic". (550 F.2d at 1112, ftn. 9; 14a)

tion, defendants have filed motions to reconsider or modify earlier court orders, which motions have consistently alleged grounds previously ruled upon by the court. The clear import of this course of conduct is to make this lawsuit as time-consuming and costly as possible.

In addition, the district court has on some occasions taken action which did not advance the progress of this litigation. The court took approximately five months to decide the class action certification motion after the evidentiary hearing was held. The court took approximately four months to approve the form of notice to the class members. These delays appear to have been justifiable due to the complex nature of the questions presented. However, during this time there was a stay of substantive discovery in effect. The practical effect of this stay was to prevent the parties from concurrently proceeding to the merits while the court considered the various procedural questions. In these circumstances, virtually all the plaintiffs could do to advance the course of this litigation was to attempt to lift the stay on discovery. Plaintiffs twice sought to lift this stay and were twice unsuccessful.

> We conclude that the district court order decertifying the action as a class action because of plaintiffs' failure to prosecute is wholly unsupported by the record, and we accordingly reverse. We do not disturb that portion of the order which lifted the stay on substantive discovery." (550 F.2d at 1112; 14a-15a)

The Court of Appeals held that it had jurisdiction to review the decertification under 28 U.S.C. § 1291 because

the denial of class certification sounded the "death knell" of the action. Such determination was based not merely on the fact that plaintiffs' individual claim for damages totals only approximately $2,650.00, but on a review of the extensive material in the record which demonstrated that it would be economically senseless for plaintiffs to proceed with the litigation on an individual basis.* Thus the Court of Appeals noted that

> "Plaintiffs, both of whom are employed, have an aggregate yearly gross income of $26,000. Their total net worth is approximately $75,000, but only $4,000 of this sum is in cash. The remainder consists of equity in their home and investments.
>
> As of December 1974 plaintiffs had already incurred expenses in excess of $1,200 in connection with this lawsuit. Plaintiffs' new counsel has estimated expenses of this lawsuit to be $15,000. The nature of this case will require extensive discovery, much of which must take place in Florida, where most defendants reside. Moreover, the allegations regarding the prospectus and financial statements will likely require expert testimony at trial.
>
> After considering all the relevant information in the record, we are convinced that plaintiffs have sustained their burden of showing that they will not pursue their individual claim if the decertification order stands. Although plaintiffs' total net worth could absorb the cost of this litigation, 'it [takes]

* As described above, such material includes deposition testimony of plaintiffs and testimony of plaintiffs and their former attorney before the District Court at the evidentiary hearing on the class motion. Such information was further supplemented by plaintiffs' present counsel's estimate of litigation expenses as presented to the District Court in September 1975.

> no great understanding of the mysteries of high finance to make obvious the futility of spending a thousand dollars to get a thousand dollars—or even less.' Douglas, Protective Committees in Railroad Reorganization, 47 Harv.L.Rev. 565, 567 (1934). We conclude we have jurisdiction to hear the appeal." (550 F.2d at 1109-10; 9a-10a) (footnote references omitted)

The Circuit Court recognized that "Plaintiffs who seek to invoke the 'death knell' doctrine have the burden of developing, in the trial court, an adequate factual record upon which an appellate court may determine whether the action will proceed absent class certification," and stated that the "preferable way to do this in a post-ruling hearing where the district court has an opportunity to enter appropriate findings of fact." The Eighth Circuit noted however that such a hearing is not necessarily required in all cases, and held that "In the instant case, the record of the entire proceeding contains sufficient facts to allow us to make an informed judgment on the matter." (550 F.2d at 1110, ftn. 5; 10a)

The Circuit Court also dealt expressly with defendants' argument that the "death knell" doctrine should not apply because the record revealed other class members having substantial individual claims. The Eighth Circuit rejected such a characterization of the record, stating that:

> ". . . the record reveals only that certain class members had indicated a willingness to pay part of the expenses of suit, and even that tangential involvement ceased after the appearance of plaintiffs' new counsel." (550 F.2d at 1109, ftn. 2; 8a-9a)*

* Testimony at the evidentiary hearing on class certification with respect to this question was supplemented by statements of record to the Circuit Court by counsel for plaintiffs.

In consequence, the Circuit Court reversed the order decertifying the class and remanded for further proceedings consistent with its opinion. The Circuit Court denied defendants' motions to stay its mandate pending preparation of petitions to this Court for issuance of writs of certiorari, and the Eighth Circuit's mandate issued on April 13, 1977.

REASONS FOR DENYING THE WRIT

I

On The Record Below, Allowance Of An Immediate Appeal From The Decertification Order Was Proper Under The Standards Employed For Such Appeals In All Circuits.

There would seem to be little basis for disagreement with the proposition that if in fact a denial of class certification effectively terminates a litigation, the denial of class certification is a final decision and an immediate appeal is appropriate under 28 U.S.C. § 1291. Recognition that the practical consequence of a denial of class status can be the termination of the entire litigation has led a number of circuits to adopt the "death knell" doctrine under which denial of class certification is immediately appealable when it results in the termination of the litigation. *E.g., Domaco Venture Capital Fund* v. *Teltronics Services, Inc.*, 551 F. 2d 508, 509 (2nd Cir. 1977); *Hooley* v. *Red Carpet Corp. of America*, 549 F.2d 643 (9th Cir. 1977); *Ott* v. *Speedwriting Pub. Co.*, 518 F.2d 1143, 1146-49 (6th Cir. 1975); *Williams* v. *Mumford*, 511 F.2d 363, 366-67 (D.C. Cir.), *cert. denied*, 423 U.S. 828 (1975); *Graci* v. *United States*, 472 F.2d 124, 126 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973); *Eisen* v. *Carlisle & Jacquelin* (*Eisen I*), 370 F.2d 119, 120-21 (2nd Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

While two circuits have refused to adopt the "death knell" doctrine, they have recognized the need for a mechanism by which a determination can be made as to whether or not a denial of class certification is sufficiently critical to the action to justify an immediate appeal by holding that the right to an immediate appeal from a denial of class certification should be determined in the first instance by the District Court pursuant to a motion for certification of an interlocutory appeal under 28 U.S.C. § 1292(b). *E.g.*, *Anschul* v. *Sitmar Cruises, Inc.*, 544 F.2d 1364, 1366-69 (7th Cir.), *cert. denied*, 87 Sup. Ct. 272 (1976); *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 752-53 (3rd Cir.), *cert. denied*, 419 U.S. 885 (1974).

Plaintiffs submit that an immediate appeal herein was appropriate under the standards employed in all circuits.

Defendants argue that the result below is inconsistent with the ruling of the Fifth Circuit in *Gosa* v. *Securities Investment Co.*, 449 F.2d 1330 (5th Cir. 1971), because subsequent to the decertification order plaintiffs did not seek an evidentiary hearing at which the District Court would rule as to whether or not the denial of class certification effectively terminated the action. Unlike the situation in *Gosa*, however, where the record contained absolutely no development of relevant facts such as anticipated litigation expenses and the financial condition of the plaintiff (see 449 F.2d at 1332), the record herein contains such information in detail. Thus, the Eighth Circuit explicitly adverted to the *Gosa* ruling, but found that the record contained ample evidence to support its conclusion that the action would not continue absent an immediate appeal. (550 F.2d at 1110, ftn. 5; 10a). As shown above in the Statement of the Case (page 5), the Circuit Court's ruling is consistent with the District Court's statement at the conclusion of the evidentiary hearing on the class

motion that an immediate appeal from a denial of class certification would be appropriate under the "death knell" doctrine.

Defendants also argue that the decision of the Eighth Circuit below is inconsistent with the decision of the Ninth Circuit Court of Appeals in *Hooley* v. *Red Carpet Corp. of America, supra,* because the Eighth Circuit refused to rule that certain statements by plaintiffs' former counsel at the evidentiary hearing on the class action concerning the existence of other purported class members who had allegedly evinced some interest in paying some costs of the action rendered this appeal premature. However, the Eighth Circuit addressed itself directly to such contentions and found on the basis of a review of the record only a prior "tangential involvement" of certain class members who "had indicated a willingness to pay part of the expenses of suit," which tangential involvement "ceased after the appearance of plaintiffs' new counsel." (550 F.2d at 1109, ftn. 2; 9a) Consequently the Eighth Circuit decision below would have been justified under the approach of the Ninth Circuit as stated in *Hooley.**

Moreover, the District Court's statement at the close of the evidentiary hearing on the class motion that an immediate appeal would be proper and desirable in the event the District Court denied class certification shows that the appeal would also be proper under the approach adopted in the Third and Seventh Circuits which provides for appeals from denial of class certification pursuant to certification by the District Judge under 28 U.S.C. § 1292(b).

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* While in one portion of the *Hooley* opinion the Ninth Circuit spoke of requiring plaintiff to show the lack of a viable claim on the part of any class member, such language was modified by other statements in *Hooley* indicating that the real concern was the likelihood that other class members would in fact pursue the action themselves. See 549 F.2d at 646.

While Judge Wangelin's statement refers to the death knell doctrine and to an appeal under Section 1291, his strong expression of support for an immediate appeal in the event that he denied class certification satisfies the requirement in the Third and Seventh Circuits that the appropriateness of an immediate appeal be determined initially by the District Court.*

II

The "Death Knell" Doctrine As Interpreted By The Court Of Appeals For The Eighth Circuit Is Fully Consistent With The "Final Decision" Rule Of 28 U.S.C. Section 1291.

Contrary to defendants' arguments, the Eighth Circuit's decision does not conflict with the federal policy of allowing appeals from final decisions as set forth in 28 U.S.C. § 1291 and involves no misallocation of manpower or judicial functions. Certainly if the litigation is in fact at an end absent a reversal of the decertification, the time is ripe for an appeal. The Eighth Circuit based its decision as to appealability on ample evidence of record showing that the action would not go forward if the District Court's order remained unchanged, and as shown above, the District Court itself had expressed its approval of an immediate appeal from a denial of class status.

Petitioners make the further argument that the death knell doctrine is unduly favorable to class action plaintiffs

* In light of the District Court's statements concerning the appropriateness of an immediate appeal, the Eighth Circuit could also have taken jurisdiction under *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 154 (1964) where this Court declared that a Court of Appeals may hear an appeal in a "marginal case" where the questions presented are "fundamental to the further conduct of the case" and where "if the District Judge had certified the case to the Court of Appeals under 28 U.S.C. § 1292(b) (1958 ed.), the appeal unquestionably wou'd have been proper. . . ."

because appeals are available to plaintiffs from class certification denials but not to defendants from orders granting class status. However, under 28 U.S.C. § 1291, the issue must be whether or not a denial of class certification does in fact bring about the termination of the litigation. If it does, an appeal must be allowed under 28 U.S.C. § 1291 regardless of the appealability of orders granting class certification. Plaintiffs submit that so long as a proper finding is made that the denial of class certification terminates the litigation, Courts of Appeal have no alternative but to allow an appeal under 28 U.S.C. § 1291.

As shown above, this appeal would have been proper under the Ninth Circuit approach as set forth in *Hooley* v. *Red Carpet Corp. of America, supra.* Plaintiffs also submit, however, that any definition of finality in class actions under which the litigation is deemed to continue after decertification unless plaintiffs affirmatively show that no other class members have viable claims would place an unreasonable burden on plaintiffs and would also be inconsistent with the purposes behind Rule 23 of the Federal Rules of Civil Procedure. Such an interpretation would encourage the very proliferation of litigation Rule 23 seeks to avoid. Moreover, under Rule 23(c)(2), nonparty class members are entitled to remain passive and allow the class representatives to protect their interests during the pendency of the class action. Denial of the right to an immediate appeal from a decertification absent proof that other class members with viable claims are unlikely to intervene is inconsistent with such policy, because such denial would require a class member who prefers to remain passive to intervene or commence his own litigation in order to protect his position.*

* Requiring class representatives to affirmatively show that no class member with a viable claim will intervene may also raise ethical problems, since communications of counsel for plaintiffs with absent class members aimed at determining whether potential intervenors exist may be misinterpreted as efforts to solicit litigation.

Such inconsistency would be especially striking in the present case, where special statutes of limitations problems would have placed considerable pressure on other class members to intervene, if contrary to the record herein, potential intervenors were in existence. The claims herein under Section 11 and 12(2) of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. §§ 77k, 77l(2), are subject to a limitations period of one year from the date upon which discovery of misleading statements and omissions "should have been made in the exercise of reasonable diligence" and to an absolute three-year limitation. Section 13 of the 1933 Act (15 U.S.C. § 77m). Plaintiffs were actively investigating a lawsuit against the defendants herein in May-June 1973, and the lawsuit was commenced in July 1973. While the statute of limitations was tolled by commencement of the class action (see, *e.g., American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974)), the decertification created a situation in which absent class members might have been threatened with loss of their claims if they did not intervene or commence their own suits prior to appellate review of the decertification.*

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* In their appellate brief, plaintiffs presented as an alternative ground for jurisdiction the "collateral order doctrine," under which appellate jurisdiction exists pursuant to 28 U.S.C. § 1291 to review orders which finally determine claims separable from the merits which are too important to be denied review and too independent of the cause to be deferred until the entire case is adjudicated. *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Plaintiffs submit that in light of the special statute of limitations problem which was created for absent class members by the decertification and in the light of the policy of Rule 23 to allow absent class members to remain passive until proof of claim forms are to be filed, the "collateral order doctrine" would have been an alternative basis for appellate jurisdiction herein. See also, Rosenn, J., dissenting in *Hackett* v. *General Host Corp.*, 455 F.2d 618, 627 *et seq.* (3rd Cir.), *cert. denied*, 407 U.S. 925 (1972).

III

The Court Of Appeals Did Not Exceed Its Proper Authority In Holding That Decertification For Alleged Undue Delay By Plaintiffs Was An Abuse Of The District Court's Discretion.

In addition to requesting this Court to grant a Writ of Certiorari to review the Eighth Circuit's acceptance of appellate jurisdiction, petitioner Coopers has requested that the writ also issue in order to determine whether the Eighth Circuit exceeded its powers in ruling that the District Court's decertification was an abuse of discretion. Unlike the case of *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 45 U.S.L.W. 4524 (May 31, 1977) upon which Coopers relies, the Court of Appeals below did not certify a class in the first instance.* The Eighth Circuit merely held that the District Court could not, after certifying a class, strip the plaintiffs of their status as class representatives on the ground of undue delay in prosecuting the litigation when the record was clear that the plaintiffs had not caused undue delay, that the defendants themselves were responsible for undue delay, and that the District Court had also contributed significantly to delay. (550 F. 2d at 1110-12; 11a-16a)

Numerous decisions recognize that, while a District Court has great latitude in deciding whether an action is maintainable as a class action, the Courts of Appeals may review such decisions for failure to properly apply legal criteria and for abuses of discretion. *E.g., Shumate & Co.* v. *Nat'l Ass'n of Securities Dealers, Inc.*, 509 F.2d 147, 155 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975); *Wetzel* v.

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* Moreover, in *East Texas Motor Freight System, Inc.*, this Court expressly stated that it was not holding that a Court of Appeals could not certify a class in the first instance, but only that the Court of Appeals had erred because the record was clear that plaintiffs in that action were not proper class representatives. Slip Opinion, p. 7.

Liberty Mutual Ins. Co., 508 F.2d 239, 245 (3rd Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Green* v. *Wolf Corp.*, 406 F.2d 291 (2nd Cir. 1968), *cert. denied*, 395 U.S. 977 (1969).

Respondents submit that the Eighth Circuit's ruling did not exeed its lawful powers but simply reversed clear error by the District Court—an essential function of the appellate system. The Court of Appeals has in no way questioned or limited the District Court's continuing power to determine whether or not the action should be maintained as a class action. The Eighth Circuit has only ruled that the District Court's express grounds for decertification have no basis in the record and that in consequence the decertification order was improper.

Coopers' real reason for seeking a Writ of Certiorari with respect to the merits of the decision below is reflected in Coopers' concern stated on page 10 of its petition that, as a result of the Eighth Circuit's decision, discovery on the merits in this litigation has at long last begun. Consistent with defendants' past practice as recognized in the Eighth Circuit's opinion (550 F.2d at 1112; 14a-15a), Coopers continues to seek new fields for litigating the question of class certification so as to find a basis for continuing to delay the substantive progress of this law suit.

The Eighth Circuit's decision was simply a classic example of a Court of Appeals carrying out its function of correcting clear error by the District Court. Consequently, no basis whatsoever exists for issuance of a Writ of Certiorari for review of the Eighth Circuit's decision on the merits.

Conclusion

On the record below, appellate jurisdiction would have been proper in any of the circuits which have dealt with the question of the appealability of denials of class certification, and the Eighth Circuit's decision was in full compliance with the "final decision" rule of Section 1291. The Court of Appeals did not exceed its authority in reversing the District Court's decertification order as an abuse of discretion. Accordingly, the petitions for Writs of Certiorari should be denied.

Dated: New York, New York
July 22, 1977

Respectively submitted,

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APPENDIX A

In the United States District Court for the
Eastern District of Missouri
Eastern Division
No. 73 C 517 (3)

—o—

Cecil and Dorothy Livesay,

Plaintiffs,

v.

Punta Gorda Isles, Inc., *et al.*,

Defendants.

—o—

Memorandum
(Filed September 1, 1976)

This matter is before the Court upon the motion of the various defendants to decertify this lawsuit as a class action.

The basis of the various defendants' motion is that the plaintiffs, as class representatives, are failing to prosecute this action, and are therefore denying the defendants a right to a speedy adjudication of the claims against them.

In order to deal with the defendants' motion, a brief chronology of events is required. This lawsuit was originally filed on July 27, 1973. Plantiffs' original counsel did not seek a class action hearing until April 9, 1974. On June 19, 1975, this Court, in a Memorandum and Order, declared that the action should proceed as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The delay between the class action hearing, and this Court's certification was due to the substituton of new counsel for plaintiffs. On October 23, 1975, this Court partially dis-

solved its stay order regarding discovery, and allowed discovery to proceed as to the names and addresses of the members of the class so that the appropriate class action notice could be sent. The plaintiffs did not institute discovery to determine the names and addresses of the absent class members until July 20, 1976.

It is the opinion of the Court that the plaintiffs have failed to offer adequate excuses for their delay in prosecuting this action as a class action. In response to the motion of the defendants, the plaintiffs have alleged that it is anomalous for the defendants to attempt to protect the interests of the members of the class. The Court agrees that such concern on the part of the defendants involve tears of the crocodilian variety, however, the plaintiffs misjudged the true thrust of the defendants' motion. The defendants are merely seeking, as is their right, to have a speedy adjudication of the claims against them. Since this lawsuit has been pending for approximately three years, and class action notices have not gone out more than a year after the action was certified as a class action, the Court is forced to the conclusion that there has been a lack of prosecution on the part of the plaintiffs as class representatives.

Since the plaintiffs seem to have no desire to prosecute this matter as a class action, the Court will decertify this matter as a class action, and the lawsuit shall proceed on the indvidual claims of Cecil and Dorothy Livesay as stated in the accompanying Order.

Dated this 1st day of September, 1976.

/s/ H. KENNETH WANGELIN
United States District Judge

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 76-1881

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Cecil Livesay and Dorothy Livesay, for Themselves and on Behalf of All Others Similarly Situated,

Plaintiffs-Appellants,

v.

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John W. Douglas, D.D.S., Coopers & Lybrand (Formerly Lybrand, Ross Bros. & Montgomery),

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

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No. 76-1906

Cecil Livesay and Dorothy Livesay, for Themselves and on Behalf of All Others Similarly Situated,

Petitioners,

v.

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton

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Farr, Jr., John W. Douglas, D.D.S., Coopers & Lybrand (Formerly Lybrand, Ross Bros. & Montgomery),

and

Honorable H. Kenneth Wangelin, United States District Judge,

Respondents.

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Petition for Writ of Mandamus

Submitted: January 13, 1977

Filed: March 4, 1977

Before HEANEY and STEPHENSON, *Circuit Judges*, and STUART,* *District Judge*.

STEPHENSON, *Circuit Judge*.

In these consolidated cases, Cecil and Dorothy Livesay (plaintiffs) seek review of the district court's order decertifying their action as a class action. In No. 76-1881, plaintiffs appeal from that order. In No. 76-1906, plaintiffs seek a writ of mandamus compelling the district court to vacate its decertification order.

On July 27, 1973, plaintiffs filed a complaint seeking approximately $2650 in individual damages resulting from their purchase of $5000 worth of debentures and 100 shares of common stock issued by Punta Gorda Isles, Inc. (Punta Gorda), a Florida land development corporation, pursuant to a registration statement and prospectus dated May 2, 1972. The essence of plaintiffs' claim was that the prospectus and registration statement contained materially mis-

* The Honorable William C. Stuart, United States District Judge for the Southern District of Iowa, sitting by designation.

Appendix B

leading statements and omissions.[1] The named defendants were Punta Gorda, certain individuals who were officers and directors of Punta Gorda, and the accounting firm of Coopers & Lybrand (Coopers), which had certified the financial statements in the registration statement and prospectus. Plaintiffs sought to represent a class of approximimately 1,800 persons who had purchased securities at the May 2, 1972, public offering.

On April 9, 1974, plaintiffs moved pursuant to Fed. R. Civ. P. 23 to have the action certified as a class action. On May 13, 1974, the district court granted Coopers' motion for a stay of all discovery except discovery relating to the class action determination. On June 24, 1974, oral argument on the class action certification motion was held. On July 16, 1974, the district court denied Coopers' motion to strike the class action allegations in the complaint, but did not at that time certify the class. On September 23, 1974, the district court denied plaintiffs' motion to lift the stay on substantive discovery.

On November 1, 1974, plaintiffs filed a petition for a writ of mandamus in this court, requesting that the district court be ordered to lift the stay on substantive discovery. This court denied the petition by order dated November 15, 1974, but expressed the view that plaintiffs should request a prompt ruling on their motion for class action certifica-

[1] Essentially, the complaint alleges: (1) a failure to disclose that new accounting rules of the American Institute of Certified Public Accountants would require an adverse restatement of earnings for 1967-1972; (2) a failure to disclose that the earnings consisted of installment sale contracts where cash would not be received until future dates; (3) a misleading statement of the ratio earnings to fixed charges because not based on actual cash flow; and (4) a failure to disclose that certain Florida ecological regulations would seriously impede Punta Gorda from developing artificial waterfront property.

tion and that the district court should promptly rule on the motion and thereafter permit discovery on the merits. *Livesay* v. *Punta Gorda Isles, Inc.*, No. 74-1827 (8th Cir., November 15, 1974).

On December 30, 1974, an evidentiary hearing on the class action certification motion was held in the district court. On June 19, 1975, the district court entered an order certifying the action as a Rule 23(b)(3) class action, which order expressly found plaintiffs to be adequate class representatives. The order also held that plaintiffs' counsel had a conflict of interest because he had represented one of the underwriters of the Punta Gorda offering on unrelated matters. The order deemed this conflict serious because none of the underwriters had been joined as defendants in the plaintiffs' suit. Plaintiffs' counsel withdrew, and on June 30, 1975, plaintiffs' current counsel entered its appearance.

On July 25, 1975, plaintiffs moved to dissolve the stay on substantive discovery. Coopers opposed the motion and sought a reconsideration of the order certifying the action as a class action. On October 23, 1975, the district court denied plaintiffs' motion to dissolve the stay. In its order, the district court expressed concern about the adequacy of plaintiffs as class representatives, based largely on plaintiffs' failure to join any underwriters as defendants. The court did not, however, decertify the class action at that time, because it believed that such decertification might jeopardize the claims of absent class members. The court directed the parties to prepare forms of notice of the pendency of the class action to be mailed to the class members and also lifted the stay on discovery to the extent that

plaintiffs could seek the names and addresses of the class members. The parties submitted proposed forms of notice in November 1975.

On March 1, 1976, the district court mailed to the parties its proposed form of notice. Both parties submitted suggested changes, and on April 9, 1976, the district court mailed to the parties the final form of notice.

On April 20, 1976, plaintiffs' counsel telephoned counsel for Punta Gorda and requested the names and addresses of the initial registered owners (after the underwriters) of the debentures and common stock sold pursuant to the May 2, 1972, registration statement. By letter dated April 21, 1976, Punta Gorda's counsel declined to furnish that information.

On July 9, 1976, plaintiffs requested the district court to conduct a conference for the purpose of discussing the issues involved in discovery of the names of class members. On July 20, 1976, plaintiffs served defendants with a motion to produce the names and addresses of the initial registered owners of the stock and debentures. On July 23, 1976, Coopers filed a motion to decertify the action as a class action. On July 26, 1976, the conference requested by plaintiffs was held at which the district court ordered the parties to submit briefs, etc. in support of the various pending motions.

On September 1, 1976, the district court issued a memorandum and order decertifying the class action. The court found that plaintiffs had inordinately delayed in prosecuting the case and were thus not adequate class representatives. The order also lifted the stay on substantive discovery. Subsequently, both parties have engaged in some discovery on the merits. Plaintiffs now seek review of the September 1 decertification order by direct appeal (No.

76-1881) and by a petition for a writ of mandamus (No. 76-1906).

We are confronted with the threshold issue of our jurisdiction to hear an appeal from the district court's order decertifying the lawsuit as a class action. Defendants allege that the order is not a final order which is appealable under 28 U.S.C. § 1291. We disagree.

Orders denying class action certification are reviewable under 28 U.S.C. § 1291 if they sound the "death knell" of the action. *See, e.g., Share* v. *Air Properties G. Inc.*, 538 F. 2d 279, 282 (9th Cir.), *cert. denied sub nom., Woodruff* v. *Air Properties G. Inc.*, 97 S.Ct. 321 (1976); *Ott* v. *Speedwriting Pub. Co.*, 518 F.2d 1143, 1146-49 (6th Cir. 1975); *Williams* v. *Mumford*, 511 F.2d 363, 366 (D.C. Cir.), *cert. denied*, 423 U.S. 828 (1975); *Shayne* v. *Madison Square Garden Corp.*, 491 F.2d 397, 399-401 (2d Cir. 1974); *Graci* v. *United States*, 472 F.2d 124, 126 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973); *Eisen* v. *Carlisle & Jacquelin* (*Eisen I*), 370 F.2d 119, 120-21 (2d Cir. 1966); *cert. denied*, 386 U.S. 1035 (1967). *See also Hartmann* v. *Scott*, 488 F.2d 1215, 1220 (8th Cir. 1973); *compare, In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213 (8th Cir.), *cert. denied*, 423 U.S. 947, *rehearing denied*, 423 U.S. 1039 (1975). *Contra, King* v. *Kansas City Southern Industries*, 479 F.2d 1259, 1260 (7th Cir. 1973); *Hackett* v. *General Host Co.*, 455 F.2d 618, 621-26 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

To determine whether a decertification order sounds the "death knell" of the action, we begin by examining the amount of the class representatives' individual claim.[2]

[2] Defendants allege that because the record reveals other members of the purported class who have substantial individual claims, the "death knell" doctrine should not apply. That was the result reached in *Share* v. *Air Properties G. Inc., supra*, 538 F.2d at 283. We do not consider the soundness of that holding, however, because the case is distinguishable on its facts. In *Share* the court referred to class members who were "actively engaged" in the litigation. Here, the record reveals only that certain class members had indicated a willingness to pay part of the expenses of suit, and even that tangential involvement ceased after the appearance of plaintiffs' new counsel.

Plaintiffs' individual claim for damages totals approximately $2,650. Because this claim falls between those cases where the individual claim is clearly not viable [3] and those cases where the individual claim is viable,[4] we must examine the amount of plaintiffs' claim in relation to their financial resources and the probable cost and complexity of the lawsuit. *See, e.g., Share* v. *Air Properties G. Inc., supra*, 538 F.2d at 282; *Graci* v. *United States, supra*, 472 F.2d at 126; *Korn* v. *Franchard Corp.*, 443 F.2d 1301, 1307 (2d Cir. 1971).

Plaintiffs, both of whom are employed, have an aggregate yearly gross income of $26,000. Their total net worth is approximately $75,000, but only $4,000 of this sum is in cash. The remainder consists of equity in their home and investments.

As of December 1974 plaintiffs had already incurred expenses in excess of $1,200 in connection with this lawsuit. Plaintiffs' new counsel has estimated expenses of this lawsuit to be $15,000. The nature of this case will require extensive discovery, much of which must take place in

[3] *See, e.g., Ott* v. *Speedwriting Pub. Co., supra* ($30); *Korn* v. *Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971) ($386); *Green* v. *Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969) ("less than $1000"); *Eisen* v. *Carlisle & Jacquelin, supra* ($70).

[4] *See, e.g., Shayne* v. *Madison Square Garden Corp., supra* ($7,482); *Falk* v. *Dempsey-Tegeler & Co.*, 472 F.2d 142 (9th Cir. 1972) ($14,125); *Milberg* v. *Western Pac. R.R.*, 443 F.2d 1301 (2d Cir. 1971) ($8,500).

Florida, where most defendants reside. Moreover, the allegations regarding the prospectus and financial statements will likely require expert testimony at trial.

After considering all the relevant information in the record, we are convinced that plaintiffs have sustained their burden [5] of showing that they will not pursue their individual claim if the decertification order stands. Although plaintiffs' total net worth could absorb the cost of this litigation, "it [takes] no great understanding of the mysteries of high finance to make obvious the futility of spending a thousand dollars to get a thousand dollars—or even less." Douglas, *Protective Committees in Railroad Reorganizations*, 47 Harv. L. Rev. 565, 567 (1934). We conclude we have jurisdiction to hear the appeal.

The district court has wide latitude in determining whether an action may be maintained as a class action. If the court applies the proper criteria in making this determination, its decision is reviewable only for an abuse of discretion. *Wright* v. *Stone Container Corp.*, 524 F.2d 1058, 1061 (8th Cir. 1975); *Shumate* v. *Nat'l Ass'n of Securities Dealers*, 509 F.2d 147, 155 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975); *Kamm* v. *California City Development Co.*, 509 F.2d 205, 210 (9th Cir. 1975); *Wetzel* v. *Liberty Mutual Ins. Co.*, 508 F.2d 239, 245 (3d Cir.),

[5] Plaintiffs who seek to invoke the "death knell" doctrine have the burden of developing, in the trial court, an adequate factual record upon which an appellate court may determine whether the action will proceed absent class certification. *Share* v. *Air Properties G. Inc., supra*, 538 F.2d at 282; *Gosa* v. *Securities Investment Co.*, 449 F.2d 1330 (5th Cir. 1971). As the *Gosa* court indicated, the preferable way to do this is in a post-ruling hearing where the district court has the opportunity to enter appropriate findings of fact. No such hearing was held in the instant case. However, we do not read *Gosa* as requiring such a hearing in all cases. In the instant case, the record of the entire proceeding contains sufficient facts to allow us to make an informed judgment on the matter.

cert. denied, 421 U.S. 1011 (1975); *City of New York* v. *Int'l Pipe & Ceramics Corp.*, 410 F.2d 295, 298 (2d Cir. 1969).

Because the decertification order in this case was predicated solely on the finding that plaintiffs were not adequate class representatives because they had inordinately delayed in prosecuting the litigation,[6] the sole issue [7] on this appeal may be simply stated: was the district court's decertification order finding plaintiffs to be inadequate class representatives so erroneous as to constitute an abuse of discretion? We answer the question in the affirmative, and we reverse.

The decertification order was apparently based upon three distinct periods of delay. The first period of delay was approximately eight months from the date of filing

[6] As plaintiffs correctly point out, the decertification order was phrased in terms of a denial of defendants' rights to a speedy adjudication of claims against them. This factor is not a proper criterion to consider in determining whether plaintiffs will adequately represent the members of the class. However, a review of the entire record convinces us that the district court was concerned with plaintiffs' failure to prosecute the case as it related to their adequacy as class representatives.

[7] Plaintiffs also seek to raise the following issues: (1) that the decertification order was erroneously predicated on plaintiffs' failure to join underwriters as defendants; (2) that the district court exhibited a lack of fair and impartial judicial procedure; (3) that the district court ordered plaintiffs to follow class action procedures which violate the federal rules; and (4) that the district court violated this court's mandate by not promptly lifting the stay on substantive discovery after certifying the class. The first two claims are devoid of factual support in the record. The third claim is relevant to the decertification order only insofar as it alleges that the class action procedures authorized by the district court impeded the progress of the litigation. As such, it merely restates the allegation that the delay was not caused by plaintiffs. The final claim is moot because the decertification order lifted the stay on substantive discovery. Moreover, as with the third claim, its only relevance to the decertification order is the allegation that the stay of discovery was a contributing cause of the delay.

the complaint until the plaintiffs moved to have the action certified as a class action. The record indicates that this period of time was largely devoted to preparing and amending pleadings and engaging in discovery. We note that plaintiffs filed their motion to certify shortly after defendants filed their last responses to plaintiffs' interrogatories. In these circumstances, we find little to support a finding that plaintiffs were dilatory in moving for class action certification. Furthermore, the general rule is that a delay prior to moving for class action certification is not a basis for refusing certification absent some showing of prejudice. *See, e.g., Bernstein* v. *National Liberty Int'l Corp.*, 407 F. Supp. 709, 714 (E.D. Pa. 1976); *Souza* v. *Scalone*, 64 F.R.D. 654, 656 (N.D. Cal. 1974); *Boring* v. *Medusa Portland Cement Co.*, 63 F.R.D. 78, 80 (M.D. Pa.), *appeal dismissed without opinion*, 505 F.2d 729 (3d Cir. 1974); *Feder* v. *Harrington*, 52 F.R.D. 178, 181-82 (S.D.N.Y. 1970); *Epstein* v. *Weiss*, 50 F.R.D. 387, 392 (E.D. La. 1970) No showing of prejudice was made here.

The second time period referred to in the decertification order was the 14 month period between the motion for class action certification and the order certifying the class. The district court's decertification order attributed this delay to the appointment of new counsel for plaintiffs. However, it should be noted that new counsel for plaintiffs did not appear until *after* the order certifying the class was entered.

The defendants' only colorable allegation of delay during this second period is that plaintiffs were dilatory in moving for an evidentiary hearing on the class action motion. The record discloses that the district court indicated during oral argument that an evidentiary hearing should be held if the court decided that the issue of individual reliance did not bar maintaining the suit as a class action. This decision was reached on July 16, 1975, and plaintiffs did not seek an evidentiary hearing until September 20, 1975, a period of nine weeks. During this nine-week period plaintiffs were not inactive. They moved to enjoin the destruction of documents and also moved to lift the stay on substantive discovery. We cannot say, and the district court did not find, that pursuing these avenues was a sign of inaction, negligence, or a failure adequately to protect the interests of other class members.

The third period of time mentioned in the decertification order is the period from the district court order allowing discovery of the names and addresses of class members until plaintiffs first sought to discover that information.[8] This period runs from October 23, 1975, to April 20, 1976, when plaintiffs first requested Punta Gorda's counsel to furnish the names and addresses of the initial registered owners of the securities. Defendants contend that because plaintiffs have offered no compelling excuse for failing to request this information more promptly, this delay *ipso facto* justified the district court's finding that plaintiffs are inadequate representatives. We disagree.

We begin by noting that there has been no showing that plaintiffs' failure to request production of this information at an earlier date has prejudiced the class members. The

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[8] A persuasive argument can be made that this is the only period of delay upon which the decertification order could properly be predicated. Because the first two periods of delay occurred prior to the certification order, defendants could have raised the issue of failure to prosecute at that time, but did not. They may now be foreclosed from raising the issue based on these delays. *Kramer* v. *Scientific Control Corp.*, 67 F.R.D. 98, 99 (E.D. Pa. 1975), *rev'd in part on other grounds*, 534 F.2d 1085 (3d Cir.), *cert. denied sub nom., Arthur Andersen & Co.* v. *Kramer*, 97 S.Ct. 90 (1976). *Cf. In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213, 215 (8th Cir.), *cert. denied*, 423 U.S. 947, *rehearing denied*, 423 U.S. 1039 (1975).

notices to the class members could not have gone out until the final form of notice was approved by the court, which did not occur until April 9, 1976. Eleven days later, plaintiffs' attorney telephoned counsel for Punta Gorda and requested that Punta Gorda furnish the names and addresses of the initial registered owners of the securities in question. In a letter dated August 4, 1975, counsel for Punta Gorda had agreed to furnish this information. However, in response to the telephone call, counsel for Punta Gorda wrote a letter to plaintiffs' counsel refusing to furnish this information.[9] In these circumstances we cannot agree that plaintiffs were dilatory in seeking the names and addresses of potential class members. They had every right to expect that defendants would promptly furnish this information. To hold that plaintiffs are inadequate class representatives because they failed to anticipate defendants' eventual objections to discovery would be tantamount to saying that class representatives must be gifted with prescience. This we decline to do.

That there has been undue delay in this lawsuit is beyond question. From examination of the entire record of this protracted proceeding, however, it becomes quite clear that much of the delay in this case is directly attributable to defendants. For example, defendants have been granted 14 extensions of time, totalling approximately 190 days, in which to file pleadings, motions and other papers. In addition, defendants have filed motions to reconsider or modify earlier court orders, which motions have consistently alleged grounds previously ruled upon by the court. The

[9] This refusal was later formalized in objections to plaintiffs' motion to produce. One of the objections to this motion was that the requested information was not in the possession of Punta Gorda, but in the possession of Punta Gorda's transfer agent. Because the transfer agent could only release this information at the direction of Punta Gorda, we find this objection little else than a delaying tactic.

clear import of this course of conduct is to make this lawsuit as time-consuming and costly as possible.

In addition, the district court has on some occasions taken action which did not advance the progress of this litigation. The court took approximately five months to decide the class action certification motion after the evidentiary hearing was held. The court took approximately four months to approve the form of notice to the class members. These delays appear to have been justifiable due to the complex nature of the questions presented. However, during this time there was a stay of substantive discovery in effect. The practical effect of this stay was to prevent the parties from concurrently proceeding to the merits while the court considered the various procedural questions. In these circumstances, virtually all the plaintiffs could do to advance the course of this litigation was to attempt to lift the stay on discovery. Plaintiffs twice sought to lift this stay and were twice unsuccessful.

We conclude that the district court order decertifying the action as a class action because of plaintiffs' failure to prosecute is wholly unsupported by the record, and we accordingly reverse. We do not disturb that portion of the order which lifted the stay on substantive discovery.

The record in this case compels us to make certain further comments. We are dismayed at the utter lack of cooperation between opposing counsel. The record is replete with instances where relatively minor procedural matters have mushroomed into full-scale confrontations, with the concomitant avalanche of briefs, memoranda, etc. By and large, these matters, could, and should, have been settled informally by the parties or, if necessary, in conference with the district court.

Appendix B

Even more disturbing is the tone with which these proceedings have been conducted. All too often the parties have engaged in personal attacks on opposing counsel and the district court. These baseless allegations are not a substitute for advocacy based on the facts and the law and they have no place in our judicial system.

On remand, we anticipate that this conduct will not reoccur. If it does, the district court will be forced to take a more active role in managing this case to insure that it progresses as expeditiously as possible consistent with fairness to the parties. *See Manuel for Complex Litigation* § 1.10 (1973).

In No. 76-1881, the order of the district court is reversed and the cause remanded for further proceedings consistent herewith. In No. 76-1906, the petition for writ of mandamus is dismissed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX C

28 U.S.C. § 1291.—Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292(b).—Interlocutory decisions

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Rule 23, F.R.Civ.P.—Class Actions

(a) PREREQUISITES TO A CLASS ACTION. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Appendix C

(b) CLASS ACTIONS MAINTAINABLE. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Appendix C

(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; NOTICE; JUDGMENT; ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and

each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) ORDERS IN CONDUCT OF ACTIONS. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.